

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
February 10, 2009 Session

**STATE OF TENNESSEE v. JOHN CHARLES JOHNSON**

**Direct Appeal from the Criminal Court for Davidson County**  
**No. 98-D-2519 J. Randall Wyatt, Jr., Judge**

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**No. M2008-00388-CCA-R3-CD - Filed December 9, 2009**

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Defendant, John Charles Johnson, appeals the trial court's entry of an amended judgment of conviction for facilitation of aggravated kidnapping stating that his sentence for this offense would be served consecutively to his sentence for especially aggravated robbery. After a thorough review, we conclude the trial court erred. This case has a long procedural history. The sentences for facilitation of aggravated kidnapping and especially aggravated robbery were originally ordered to be served concurrently, and these judgments have now long been final judgments not subject to being amended. Accordingly, we reverse and remand to the trial court for entry of an appropriate amended judgment reflecting that the sentence for facilitation of aggravated kidnapping is to be served concurrently with the sentence for especially aggravated robbery.

**Tenn. R. App. P. 3 Appeal as of Right;  
Judgment of the Criminal Court Reversed and Remanded**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Wendy S. Tucker, Nashville, Tennessee, for the appellant, John Charles Johnson.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Procedural Background**

Following a jury trial, Defendant was convicted on November 3, 1999, of especially aggravated robbery, second degree murder, and facilitation of aggravated kidnapping. Following a sentencing hearing, the trial court sentenced Defendant to twenty-five years for second degree murder, five years for facilitation of aggravated kidnapping, and twenty years for especially

aggravated robbery. The trial court further ordered that Defendant's sentences for second degree murder and facilitation of aggravated kidnapping be served consecutive to each other and concurrent with Defendant's sentence for especially aggravated robbery, for an effective sentence of thirty years.

On direct appeal, this Court reversed the trial court's imposition of consecutive sentencing and remanded for a new sentencing hearing. See State v. John Charles Johnson, No. M2000-00529-CCA-R3-CD, 2001 WL 208512, at \*1 (Tenn. Crim. App., at Nashville, Mar. 1, 2001), perm. to appeal denied (Tenn. July 9, 2001). On remand, the trial court again imposed consecutive sentencing finding:

It is therefore the opinion of this Court that the appropriate sentence of this defendant, John Charles Johnson, be twenty five (25) years for second degree murder, five (5) years for facilitation of aggravated kidnapping, and twenty (20) years for especially aggravated robbery. It is further ordered that the sentences for second degree murder and facilitation of aggravated kidnapping be served consecutive to each other, but concurrent with the sentence for especially aggravated robbery, for an aggregate sentence of thirty (30) years.

This Court affirmed the sentence on appeal. See State v. John Charles Johnson, No. M2001-01567-CCA-R3-CD, 2002 WL 533946, at \*1 (Tenn. Crim. App., at Nashville, Apr. 10, 2002), no perm. to appeal filed.

Thereafter, Defendant filed a petition for post-conviction relief, alleging ineffective assistance of counsel and prosecutorial misconduct, and a petition for a writ of error coram nobis, alleging newly discovered evidence. After an evidentiary hearing, the post-conviction court denied post-conviction relief and dismissed the petition for writ of error coram nobis without a full evidentiary hearing. On appeal, this Court affirmed the post-conviction court's dismissal of Defendant's coram nobis petition. See John C. Johnson v. State, No. M2004-02675-CCA-R3-CO, 2006 WL 721300, at \*21 (Tenn. Crim. App., at Nashville, March 22, 2006), perm. to appeal denied (Tenn. Aug. 20, 2007). However, we concluded that:

the trial court should have instructed the jury on the lesser-included offenses of reckless homicide, facilitation of reckless homicide, criminally negligent homicide, or facilitation of criminally negligent homicide, and the error in failing to give such instructions was not harmless. We conclude that counsel was deficient in failing to raise the issue on appeal, and the petitioner was prejudiced by this deficiency.

Id., 2006 WL 721300, at \*18. The post-conviction court remanded to the trial court for a new trial solely on the murder charge. Id., 2006 WL 721300, at \*1. Post-conviction relief was denied as to all other issues. Id.

Defendant's retrial for second degree murder was set for January 22, 2007. In the meantime, Defendant filed a motion for release pending the new trial on the murder charge, which was denied

by the trial court. Defendant apparently believed that all three of his convictions had been reversed and remanded for new trial on post-conviction review. Defendant sought review of the trial court's denial of his motion. In an order dated January 2, 2007, this Court concluded that only the murder charge was remanded to the trial court for a new trial following post-conviction review. The order states in pertinent part:

[a]ccordingly, [Defendant] stands convicted of facilitation of aggravated kidnapping and especially aggravated robbery, for which he is serving an effective twenty-five [sic] year sentence. Because [Defendant's] remaining convictions and sentences remain in effect, the trial court did not err in denying [Defendant's] release pending the new trial on the murder charge. Accordingly, [Defendant's] present motion for review is hereby denied.

The State thereafter filed a "motion for clarification of sentence or alternatively a motion for a new sentencing hearing" based on the notation reflected in the January 2, 2007, order that Defendant was "serving an effective sentence of twenty-five years [sic]" for his facilitation and robbery convictions. The State reasoned that because Defendant's robbery sentence was to be served concurrently with his murder sentence, and because Defendant's facilitation sentence was to be served consecutively to his murder sentence, then "logically," Defendant's facilitation sentence would also run consecutively to his robbery sentence. Based on this analysis, the State argued that Defendant was thus serving an effective twenty-five year sentence for his facilitation and robbery convictions as reflected in the January 2, 2007, order of this Court.

Following a hearing on the State's motion for clarification, the trial court found that:

the State's argument is logically based. The Court further finds most compelling that the Court of Criminal Appeals stated in its Order on January 2, 2007, that the Defendant "stands convicted of facilitation of aggravated kidnapping and especially aggravated robbery, for which he is serving an effective twenty-five year sentence."

The trial court further found "that, even without the facts of the murder conviction, a sufficient foundation was laid at the Defendant's sentencing hearing as the basis for the Court's reasoning to impose consecutive sentences." The trial court entered an amended judgment of conviction for facilitation of especially aggravated kidnapping to reflect that Defendant is to serve his five-year facilitation sentence consecutively to his twenty-year robbery sentence for an effective sentence of twenty-five years. The State entered a nolle prosequi as to the murder charge in count one of the indictment.

## **II. Analysis**

On appeal, Defendant argues that the trial court erred "in re-sentencing [him] in counts three and four of the indictment without conducting a re-sentencing hearing." However, as the State now submits on appeal, we conclude that the trial court was without jurisdiction to amend Defendant's

judgment of conviction for facilitation of especially aggravated kidnapping to alter the manner of service of this sentence.

Rule 32(c)(1) of the Tennessee Rules of Criminal Procedure provides that when a defendant is convicted of multiple offenses, the trial court shall determine whether the sentences are to be served concurrently or consecutively. The rule further provides that “[u]nless it affirmatively appears that the sentences are consecutive, they are deemed to be concurrent.” Tenn. R. Crim. P. 32(c)(1). In the case sub judice, the trial court specifically ordered Defendant to serve his sentence for his facilitation of aggravated kidnapping consecutively to his sentence for his murder conviction, but there is nothing in the judgments for facilitation of aggravated kidnapping or especially aggravated robbery that indicates that these sentences were to be served concurrently with or consecutively to each other. Thus, as per the plain dictates of Rule 32(c)(1), absent affirmative notation of consecutive sentencing, the sentences must be served concurrently.

The general rule in Tennessee is that a judgment becomes final thirty days after entry unless a timely notice of appeal or a specified post-trial motion is filed. Tenn. R. App. P. 4(a) and (c); State v. Peele, 58 S.W.3d 701, 704 (Tenn. 2001); State v. Pendergrass, 937 S.W.2d 834, 837 (Tenn. 1996). In a criminal case, when a notice of appeal is filed, the jurisdiction of the Court of Criminal Appeals attaches, and the trial court loses jurisdiction. Pendergrass, 937 S.W.2d at 837. Moreover, jurisdiction to modify a final judgment cannot be grounded upon waiver or agreement by the parties. State v. Hamlin, 655 S.W.2d 200 (Tenn. Crim. App. 1983). Any judgments made outside the court’s jurisdiction are void. Peele, 58 S.W.3d at 704; Pendergrass, 937 S.W.2d at 837 (citing Brown v. Brown, 198 Tenn. 600, 281 S.W.2d 492, 497 (1955)).

After a judgment reflecting a legal sentence becomes final, “the only jurisdiction to amend a sentence in a manner more onerous than that initially imposed stems from probation violations, violations of jail or workhouse rules, or community corrections program modifications or violations,” or to correct a clerical error in the judgment that resulted from the trial court’s oversight or omission pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure. State v. Moore, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991) (citations omitted).

None of these circumstances apply in this case.

At the conclusion of Defendant’s resentencing hearing following remand, the trial court ordered Defendant to serve his sentence for facilitation of especially aggravated kidnapping consecutive to his sentence for his murder conviction, but concurrently with his sentence for especially aggravated robbery. The trial court lost jurisdiction to amend Defendant’s judgment of conviction when a notice of appeal was filed on the issue of sentencing alone. This Court affirmed the trial court’s sentencing determinations. Defendant’s conviction for second degree murder was subsequently reversed in post-conviction proceedings. The murder charge was dismissed following a nolle prosequi by the State. Thus, Defendant now stands convicted of facilitation of especially aggravated kidnapping and especially aggravated robbery with concurrent sentences of five years and twenty years respectively, for an effective sentence of twenty years.

We observe that on appeal, Defendant argues for the first time that his five-year sentence for facilitation of especially aggravated kidnapping and the trial court's order of consecutive sentencing violate his Sixth Amendment right to a jury trial under the principles articulated in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). Defendant's judgment of conviction and sentence for facilitation of especially aggravated kidnapping, however, is final. Moreover, this Court has repeatedly held that Blakely and its progeny did not create a new rule of law entitled to retroactive application in the context of a habeas corpus or post-conviction proceeding. See e.g. Glen Cook v. State, No. W2006-01514-CCA-R3-PC, 2008 WL 821532, at \*10 (Tenn. Crim. App., at Jackson, Mar. 27, 2008), perm. to appeal denied, (Tenn. Sept. 29, 2008); Billy Merle Meeks v. Ricky J. Bell, Warden, No. M2005-00626-CCA-R3-HC, 2007 WL 4116486, at \*7 (Tenn. Crim. App. Nov. 13, 2007) perm. to appeal denied (Tenn. Apr. 7, 2008). Nor does a trial court's imposition of consecutive sentences violate Sixth Amendment principles. Oregon v. Ice, \_\_\_ U.S. \_\_\_, 129 S. Ct. 711, 715 n.3, 716-720 (2009); State v. Allen, 259 S.W.3d 671, 689 -690 (Tenn. 2008). Defendant is not entitled to relief pursuant to this particular argument.

Based on the foregoing and notwithstanding the misstatement as to sentencing reflected in this Court's order dated January 2, 2007, we conclude the trial court lacked jurisdiction to enter an amended judgment of conviction for the offense of facilitation of especially aggravated kidnapping, altering the manner of service of this sentence. Accordingly, we reverse the trial court's amended judgment stating that the Defendant's sentence for his conviction of facilitation of especially aggravated kidnapping (five years) be served consecutive to the sentence for his conviction of especially aggravated robbery (twenty years). We remand for the trial court to enter an amended judgment regarding the facilitation to commit especially aggravated kidnapping, stating that the sentence shall be served concurrently with the sentence for especially aggravated robbery.

### CONCLUSION

After a thorough review, we reverse the trial court's amended judgment of conviction for facilitation of especially aggravated kidnapping and remand for entry of an amended judgment consistent with this opinion.

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THOMAS T. WOODALL, JUDGE